PHANG SEE YUEN

v.

DINERS CLUB (MALAYSIA) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NO: R3-12B-817-2009]
11 JANUARY 2010

BANKING: *Banks and banking business - Credit card - Claim for amounts owing from usage of credit card - Debtor's ledgers and statement of accounts produced by issuer to prove amounts owing - Whether charge slips need to be produced - Time for limitation period to run from date of last credit card transaction*

EVIDENCE: *Documentary evidence - Computer generated documents - Admissibility - Oral evidence adduced of documents being computer generated - Whether certificate under s. 90A(2) Evidence Act 1950 nevertheless required*

EVIDENCE: *Documentary evidence - Primary evidence - Definition, of - Whether original copies of documents constituted primary evidence - Evidence Act 1950, s. 62*

EVIDENCE: *Presumption - Adverse inference - Evidence Act 1950, s. 114(g) - Failure to produce documents - Whether evidence withheld or suppressed - Whether documents material - Whether proper to draw adverse inference*

LIMITATION: *Actions in contract - Accrual of cause of action - Running of time - Time to run from date of breach - Claim for amounts owing from usage of credit card - Time to run from date of last credit card transaction - Whether plaintiff's claim time barred*

The appellant/defendant was sued by the respondent/plaintiff for a sum of RM64,508.96 as at 30 November 2002 being amounts owing for the usage of a credit card. The respondent proved the transactions done by the appellant with the amount outstanding by producing debtor's ledgers and statement of accounts. The learned session's judge allowed the respondent's claim. The appellant appealed against this decision. The appellant, *inter alia*, contended that: (i) since the entries in the respondent's ledgers were based on charge slips and the respondent did not produce these charge slips, adverse inference under s. 114(g) of the Evidence Act 1950 ('the Act') applied against the respondent; (ii) the ledgers in its true

form and nature were secondary documents or hearsay; (iii) the ledgers and statement of account being computer generated documents, were inadmissible under s. 90A(2) of the Act for failure to produce the certificate as required by the section; and (iv) the respondent's claim was time barred because the transactions were carried out in September to November 1996 and the summons was filed only on 27 December 2002, beyond the six years limitation period.

Held (dismissing the appellant's appeal with cost):

(1) Adverse inference may be drawn only if there was withholding or suppression of evidence by the respondent. PW2 said that the ledgers were prepared based on the charge slips. This meant that the entries in the ledgers were similar to the one in the charge slips. There was no suggestion that the contents of the ledgers were not accurate or not true. There was no element of suppression here and the appellant's contention failed. (paras 9 & 10)

(2) Section 62 of the Act states that primary evidence means that the document itself is produced for the inspection of the court. Since the ledgers produced were the original copy, the appellant's contention failed. (paras 13 & 14)

(3) Once oral evidence of documents being computer generated is adduced, it is not incumbent on the party who wishes to tender the document to produce a certificate under s. 90A(2). PW2 had given an unchallenged evidence that she herself printed the ledgers and statement of account through a computer. This testimony was sufficient to enable the deeming provision in s. 90A(6) to apply in that the documents shall be deemed to be produced by the computer in the course of its ordinary use. There was thus no necessity for the respondent to produce a certificate under s. 90A. (paras 15, 18, 19 & 20)

(4) The respondent's cause of action was breach of contract. The right to sue on a contract accrues on its breach and therefore time runs from breach. The last transaction done by the appellant was on 30 December 1996. For the purpose of limitation, time began to run from 30 December 1996 and expired on 30 December 2002. The summons was filed on 27 December 2002, three days short for limitation to set in. Therefore, the claim was not time barred. (paras 22 & 23)

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 CA ***(refd)***
Chan Yuet Chun @ Chan Oi Lin (Berniaga Sebagai Wing Sun Trading Co) v. Martego Sdn Bhd [1996] 2 BLJ 431 HC ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***
Lucas v. Williams & Sons [1982] 2 QB 113 ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Paramill Sdn Bhd & Anor v. Datuk Joseph Pairin Kitingan [2007] 6 CLJ 192 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 62, 90A(2), (6), 101, 114(g)

For the appellant/defendant - Rakhbir Singh; M/s Rakhbir Singh & Co
For the respondent/plaintiff - Khalida; M/s PM Tan Yaty Chin

Reported by Amutha Suppayah

JUDGMENT

Hadhariah Syed Ismail JC:

[1] The appellant/defendant was sued by the respondent/plaintiff in the court below for allegedly owing the respondent a sum of RM64,508.96 as at 30 November 2002 for the usage of the respondent's credit card. The learned Session's Court judge allowed the respondent's claim. Judgment was entered against the appellant for a sum of RM64,508.96 together with interest and cost. Against that decision, the appellant now appeal to this court.

[2] The appellant is a client of the respondent having subscribed to a diner's club card. He has made an application to the respondent to use the credit card facilities by filling in the Diners Club Personal Card Application Form as can be found on p. 9 of the appeal record. He was assigned a card No. 3642-887488-7004. The appellant in his evidence admitted the usage of the card is subject to the terms and conditions contained in the application form. He also agrees that he is bound by those terms and conditions. He did not deny using the card for various transactions. He denied owing any money to the respondent. In para. 4 of his defence, the appellant pleaded that the amount claimed by the respondent was accumulated due to the respondent's delay in making a claim against him.

[3] It is the respondent's case that the card was not returned back to them. At the trial, evidence was led by the respondent's witnesses that the last transaction done by the appellant was on 30 December 1996. Despite monthly statement of account sent and received by the appellant, he failed to make payment. Hence this action.

[4] The grounds in support of the appeal are:

1. The respondent has failed to proof their claim; and

2. The claim is barred by limitation.

The First Ground

[5] It is not disputed that pursuant to s. 101 of the Evidence Act 1950, the burden of proof lies on the respondent to prove their claim. The respondent sought to prove the transactions done by the appellant with the amount outstanding by producing debtor's ledgers (in pp. 24-28 of the appeal record) and statement of accounts (in pp. 13-23 of the appeal record).

[6] The respondent's second witness (PW2) who prepares the ledger has explained that the ledger shows the opening balance of the transactions for the month, service charges and late payment charges and closing balance for the month. When asked to explain how the ledgers were prepared, his answer was:

> Initial stage of process involves data capturing. Data are gathered from various sources for input by IT Department eg, charge transaction incurred by card holder. They are submitted by our merchant who accept Diners Club card in the form of charge slip. Payment made by card holder in the form of cash receipt/cheques and online transfer. Adjustment entries raised by our finance department and dispute pending investigation will also be recorded. At the end of the month, system will compute renewal fee, service charge and late payment charges, if applicable. Upon completion of month end processing, billing of card member will be completed in the form of statement of account and letter ledger.

[7] It is the appellant's contention that since the entries in the ledgers are based on charge slips, it is incumbent on the respondent to produce the charge slips. More so when the respondent having had possession of the charge slips, wilfully refused to produce the same without giving any reasons. In the circumstances, the appellant contends adverse inference under s. 114(g) of the Evidence Act 1950 applied against the respondent in that if the charge slips were produced, they would not be favourable to the respondent. In

support, learned counsel for the appellant relied on *Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 CLJ 179 and *Chan Yuet Chun @ Chan Oi Lin (Berniaga Sebagai "Wing Sun Trading Co) v. Martego Sdn Bhd* [1996] 2 BLJ 431. It is for these reasons, the appellant submit the respondent's claim must fail.

[8] Learned counsel for the respondent contends that adverse inference is not applicable because all the information pertaining to the appellant's account have been recorded into the ledgers. Furthermore, during cross-examination of the respondent's witnesses, counsel for the appellant never put any question to the witness as to why the charge slips were not produced.

[9] It is trite law that adverse inference may be drawn only if there was withholding or suppression of evidence by the respondent - see *Paramill Sdn Bhd & Anor v. Datuk Joseph Pairin Kitingan* [2007] 6 CLJ 192; *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221.

[10] The questions that need to be asked is, was there truly a suppression of evidence by the respondent in failing to produce the charge slips? What is the effect of the non production of the charge slips to the ledgers? When PW2 says the ledgers are prepared based on the charge slips, in essence it means the entries in the charge slips was copied or transferred to the ledgers. This means the entries in the ledgers are similar to the one in the charge slips. There was no suggestion that without the charge slips, the contents of the ledgers are not accurate or not true. In fact the accuracy of the ledgers was not challenged. Question posed during cross-examination is confined to on how the ledgers were prepared. There was no suggestion there was manifest error in the ledgers. Non production of a document *per se* does not invite adverse inference. There must be proved an element of suppression. In this case, the respondent chose to produce the ledgers which contain the very same information in the charge slips. It is to be noted that the transactions done by the appellant can also be seen in the ledgers as they are not that many. The bulk of the claim comprise of service charge (SC) and late payment charges (LPC). The information disclosed in the ledgers are sufficient to prove what are the transactions done and how the amount claimed is derived. Therefore there was no element of suppression here. The appellant's contention must fail.

[11] Next argument with regard to the ledgers put forward by the appellant is this. The ledgers in its true form and nature are secondary documents or hearsay.

[12] Learned counsel for the respondent stress that the ledgers are the original copy and computer generated.

[13] Section 62 of the Evidence Act 1950 states primary evidence means the document itself produced for the inspection of the court. The difference between primary and secondary evidence was explained in the case of *Lucas v. Williams & Sons* [1982] 2 QB 113, 116 (CA) as:

> Primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation of its absence has been given.

[14] In view of the fact that the ledgers produced are in fact the original copy, the appellant's contention must fail. Though the ledger originates from the charge slips, both document must be treated separately because they are in different form. Here the primary evidence must relate to the original copy of the ledger and not the origin of it.

[15] Still on ledgers, the appellant also argue the ledgers and statement of account being a computer generated documents are inadmissible under s. 90A(2) of the Evidence Act 1950 for failure to produce the certificate as required under the said section.

[16] Learned counsel for the respondent contends it is not mandatory for the respondent to produce the certificate under s. 90A. He relied on *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6 wherein the Court of Appeal held:

> Sub-section (1) of s. 90A allows the production of computer generated documents or statements if there is evidence, firstly, that they were produced by a computer, and secondly, that the computer produced them in the course of its ordinary business. However, once the prosecution adduce evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s. (2) as sub s. (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

[17] The same approach was taken by Federal Court in *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800.

[18] Both the cases referred to above have established that once oral evidence of documents being computer generated is adduced, it is not incumbent on the party who wish to tender the document to produce a certificate under sub-s. (2) of s. 90A.

[19] In this case, the respondent's second witness (PW2) had given an unchallenged evidence that she herself prints the ledgers and statement of account through a computer. Her oral testimony of the documents being computer generated is itself sufficient to enable the deeming provision in sub-s. (6) of s. 90A to apply in that the documents shall be deemed to be produced by the computer in the course of its ordinary use.

[20] Applying the principles in both the cases cited above to the facts of this, I hold that there is no necessity for the respondent to produce a certificate under s. 90A. Again their contention must fail.

The Second Ground

[21] Para 5 of the statement of defence pleads the defence of limitation. It is the appellant's contention that the respondent's claim is time barred because the transactions were carried out in September to November 1996. But the summons was filed only on 27 December 2002, beyond the limitation period of six years.

[22] It is trite law when the appellant pleaded the defence of limitation, the burden of proof lies with the respondent to prove that their action is within the limitation period. The respondent's cause of action here is breach of contract. To determine when time starts running for the purpose of limitation period, one need to know when the cause of action accrues. In *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, the Federal Court held:

> In *Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610, 617, Viscount Dunedin described "cause of action" as that which makes action possible. Now, what make possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore time runs from breach (per Field J in *Gibbs v. Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 571A 325). It would seem clear, therefore, that the expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" mean one and the same thing when one speaks of the time from which the period of limitation as prescribe by law should run.

[23] In this case, the unchallenged evidence of the respondent's witnesses is the last transaction done by the appellant was on 30 December 1996. For the purpose of limitation, time begins to run from 30 December 1996 and expires on 30 December 2002. Here, the summons was filed on 27 December 2002, three days short for limitation to set in. But nevertheless, it is still within the limitation period and not time barred. The appellant's contention, therefore must fail. In the circumstances, the learned Session's Court judge was right in holding the respondent's claim is not time barred.

[24] For the above stated reasons, the appellant's appeal is dismissed with cost.